

Summer 1980

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Recommended Citation

Snow, Carlton J. and Abramson, Elliott M. (1980) "By the Light of Dual Employment: Standards for Employer Regulation of Moonlighting," *Indiana Law Journal*: Vol. 55 : Iss. 4 , Article 1.
Available at: <http://www.repository.law.indiana.edu/ilj/vol55/iss4/1>

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By the Light of Dual Employment: Standards for
Employer Regulation of Moonlighting†

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A recurring problem in labor relations involves the extent to which employers discipline employees for "moonlighting," the practice of holding more than one job.¹ Employees who are disciplined for their outside employment often contest an employer's sanction. In many cases, arbitrators make a final determination concerning the propriety of discipline imposed by an employer. From a comparative standpoint, these arbitration awards often seem contradictory and confusing. This article will analyze and critique arbitration decisions on moonlighting in an effort to define the criteria used by arbitrators to reach their conclusions. This article will also examine the decisions for the purpose of commenting on the extent to which private and public sector employers can or should control the outside pecuniary activities of their employees.

Although there is some indication that contractual provisions restricting outside employment are less common today than they

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¹ Over 90 arbitration cases involving moonlighting have been reported. See 63-1 to 80-1 Lab. Arb. Awards (1963-1980); 1-73 Lab. Arb. & Disp. Settl. (1946-1980). Since these reported decisions represent only a fraction of the cases actually arbitrated, the number of cases involving moonlighting is probably much greater. For a discussion of other off-the-job activities for which employees have been disciplined, see Kovarsky, *Discharges for Events Occurring Away from Work*, 1962 LAB. L.J. 374.

were a few years ago,³ arbitrators are still being presented with problems arising from an employee's dual employment. The existence of a dual employment problem is hardly surprising in light of the fact that, as of May, 1977, the number of persons holding two or more jobs was at least 4.6 million, or 5% of the total work force.³ Moonlighters can be found in all segments of modern society, from agricultural laborers or industrial workers to college professors. This diversity of occupations involved in moonlighting activities is accompanied by a diversity of factors which motivate a person to hold two or more jobs. As one might expect, most moonlighters hold two or more jobs for economic reasons: to meet household expenses, pay off debts, or save money for the future.⁴ Approximately 40% of those who moonlight, however, do so for other reasons: to obtain broader work experience, to build a business, or for enjoyment.⁵ Although holding a second job may be more crucial to some than to others, the second job is important to all those who choose to moonlight. For this reason, it is important for arbitrators who decide on the propriety of discipline imposed for moonlighting, to carefully consider the reasonableness of both the limits that are placed on an employee's outside employment, and the discipline imposed by an employer for holding two jobs.

³ This conclusion is based on opinions of arbitrators and labor. The National Master Freight Agreement dropped its moonlighting provision in 1976. For a description of some contractual provisions, see [1979] 2 COLLECTIVE BARGAINING NEGOTIATIONS & CONTS. (BNA) pt. 40, at 13; *id.* pt. 62, at 62, 185-86; *id.* pt. 95, at 601-03.

Moonlighting continues to be a topic of substantial significance in the entertainment industry. Letter from Kim Zeller, Information Director, Screen Actors Guild, (August 7, 1979). For an interesting article on moonlighting in the entertainment industry, see Blake, *Moonlighting Becomes You: Americans Talk about Their Second Jobs*, 7 PERFORMING ARTS REV. 91 (1977).

⁴ MONTHLY LAB. REV., Jan., 1978, at 27. For some statistics on moonlighting, see S. COHEN, LABOR IN THE UNITED STATES 265 (5th ed. 1979); MONTHLY LAB. REV., Nov., 1975, at 56; *id.*, Feb., 1975, at 60.

In the 1960's there were numerous articles on teachers who moonlight. See, e.g., Guthrie, *Teachers in the Moonlight*, MONTHLY LAB. REV., Feb., 1969, at 28; Hirsch, *Moonlighting: A problem for boards to tackle*, SCH. MANAGEMENT, June, 1962, at 67; Turner, *Moonlight over the Chalkboard*, NAT'L EDUC. A.J., April, 1962, at 29; *Moonlighting? . . . Me Too*, NAT'L EDUC. A.J., Sept., 1963, at 48. Teachers were not the only persons in the public school system attracting attention by moonlighting; principals also appeared to hold second jobs with some frequency. Smith & Cooper, *Moonlighting by Principals*, NAT'L ELEMENTARY PRINCIPAL, April, 1966, at 14. For a description of the situation in the corporate world, see Davey & Brown, *The Corporate Reaction to Moonlighting*, CONF. BD. REP., June, 1970, at 31.

⁵ Perella, *Moonlighters: Their Motivations and Characteristics*, MONTHLY LAB. REV., August, 1970, at 57; Wilensky, *The Moonlighter: A Product of Relative Deprivation*, INDUS. REL., Oct., 1963, at 105.

⁶ Perella, *supra* note 4, at 58.

The first problem confronting an inquiry into multiple job-holding is to determine who is to be considered a moonlighter. The National Industrial Conference Board defines moonlighting as working at a paid job that is separate from one's regular job, is performed after working hours and occupies at least ten hours a week.⁶ For several reasons this definition is inadequate for the purposes of this article. First, it is unclear whether a self-employed person falls within the perimeters of the definition. Second, it is possible to have a second job that is not performed after hours. In one instance, for example, an employer disciplined an employee for performing work elsewhere during his lunch hour.⁷ Finally, the arbitrary ten-hour limit would exclude from the definition many workers who have been disciplined for holding outside jobs of less than ten hours a week.

A more thorough description of a multiple job-holder is the definition used by the Bureau of Census for the Bureau of Labor Statistics, which applies the designation of "moonlighter" to employed persons who (a) hold jobs as wage or salary workers with two or more employers, (b) are self-employed, and also hold secondary wage or salary jobs, or (c) are unpaid family workers who also hold secondary wage or salary jobs.⁸ Although this standard is far more useful than the one utilized by the National Industrial Conference Board, it is also somewhat ambiguous. For example, under this definition it is unclear whether a teacher who works as a cabdriver in the summer is a moonlighter.

It is surprising that arbitrators who decide grievances involving moonlighting have neglected to define the term. Arbitrators appear to have accepted a common meaning of moonlighting as that of working more than one job. They have not concerned themselves with ambiguities inherent in such an elemental definition. Perhaps the reason for this lack of concern with definition is that, in determining whether an employee has been unjustly disciplined, it often is irrelevant whether that person is categorized as a "moonlighter". Instead, the question is whether the collective bargaining agreement between the parties has been violated by an employer's action. Thus, an employee who continues to be absent from work because of a second job elsewhere will be suspended or discharged

⁶ Blake, *supra* note 2, at 100.

⁷ NLRB v. Central Power & Light Co., 425 F.2d 1318 (5th Cir. 1970), *enforcing* Central Power & Light Co., 173 N.L.R.B. 287 (1968).

⁸ Perella, *supra* note 4, at 57.

not for moonlighting, but for repeated absences.⁹

The focus of this study is those situations in which an employee's moonlighting activity or the ramifications of an employee's secondary job results in friction between an employer and an employee. Thus, the reason given for the disciplinary action may be the employee's second job, disloyalty, repeated absences or lying to an employer. If a worker is arguably subject to discipline by a primary employer as a result of work performed other than at the primary job site, then that person would be considered a moonlighter. This approach to moonlighting gives the term a rather broad scope but one that is molded to the purposes of this study.

ARBITRATION AWARDS IN THE PRIVATE SECTOR

One problem involved in attempting to discern a set of criteria for resolving disputes involving multiple jobholders is the variety of circumstances generating discipline for outside employment. Working at a secondary job while on sick leave from the primary employer, working two full-time jobs, taking a leave of absence to work at another job, or working part-time for a competitor, may all evoke punishment from an employer. While all of these situations involve holding a second job, the distinctive characteristics of each situation deserve individual attention and will be treated separately.

"Competition with the Employer" and "Conflict of Interest"

Moonlighters are most commonly disciplined for outside activities when their second job involves competition with their primary employer. Although arbitrators defer to the proposition that employees owe their employers loyalty,¹⁰ some simply pronounce this proposition with little or no explanation,¹¹ while others explain that this duty of loyalty arises from the considerable expense required to train an employee for a given job.¹² There is, however, a consensus among arbitrators that the duty of loyalty exists, and

⁹ See, e.g., Whippany Paperboard Co., 68-1 Lab. Arb. Awards 3827 (1968) (Buckwalter, Arb.).

¹⁰ See Foster, *Disloyalty to the Employer*, 20 ARB. J. 157 (1965).

¹¹ Moore Business Forms, Inc., 57 Lab. Arb. & Disp. Settl. 1258, 1261 (1971) (Larson, Arb.).

¹² Cummins Diesel Sales Corp., 34 Lab. Arb. & Disp. Settl. 636, 647 (1960) (Gorsuch, Arb.).

that competing with one's employer is a breach of this duty. Nevertheless, despite such agreement, the precise lineaments of such a duty remain unclear.

Employers frequently promulgate rules which prohibit employees from engaging in any work which competes with the company. Such rule-making authority has been challenged by those disciplined for breaching the regulation. Arbitrators almost uniformly have held that an employer may unilaterally impose such regulations as part of his inherent authority to make reasonable shop rules regulating the conduct of employees.¹³ This authority has been recognized even when there is no "management rights" clause in the collective bargaining agreement.¹⁴

The uniformity of this view is surprising in light of language in the National Labor Relations Act directing employers to bargain about wages, hours, and other terms and conditions of employment.¹⁵ However, it is the belief of some arbitrators that plant rules which prohibit an employee from competing with an employer, although pertaining to working conditions, also affect the entire economic structure and well-being of a company.¹⁶ One arbitrator observed:

If an employee were able to work 40 hours per week for an employer and spend his outside hours degrading the employer's product, the employer and the whole plant would eventually suffer. By the same token, if the employee in a more subtle manner detracted from the Company's market of prospective customers by performing this service on his own, then he is not performing his duty of loyalty that he owes his employer. There is further the possibility of a leakage of trade secrets, and other information relative to the economic structure of the principal employer. This can only decrease the Company's effectiveness and in doing so, it affects the whole operation from the manager down to its lowest employee. Surely, it cannot be argued that the employer has bargained

¹³ F.E. Myers & Bros. Co., 64-3 Lab. Arb. Awards 6069, 6071 (1964) (Teple, Arb.). See generally Cincinnati Tool Co., 52 Lab. Arb. & Disp. Settl. 818, 821 (1969) (Kates, Arb.); Harvard Mfg. Co., 69-1 Lab. Arb. Awards 4083, 4085 (1968) (Kates, Arb.); Wisconsin Elec. Power Co., 67-1 Lab. Arb. Awards 3487, 3496 (1967) (Anderson, Arb.); United Eng'r & Foundry Co., 37 Lab. Arb. & Disp. Settl. 1095, 1098 (1962) (Kates, Arb.); American Monorail Co., 27 Lab. Arb. & Disp. Settl. 540, 542 (1956) (Kates, Arb.).

¹⁴ Cummins Diesel Sales Corp., 34 Lab. Arb. & Disp. Settl. 637, 641 (1960) (Gorsuch, Arb.).

¹⁵ 29 U.S.C. § 158(d) (1976).

¹⁶ Cummins Diesel Sales Corp., 34 Lab. Arb. & Disp. Settl. 636, 642 (1960) (Gorsuch, Arb.).

away its right to demand this duty of loyalty on the part of its employees.¹⁷

However, at least one arbitrator has questioned an employer's broad rule-making authority to limit competition from employees. In *Sperry Rand Corp.*,¹⁸ the employer had a stated policy which prohibited employees from competing with the company. The employee had knowledge of the policy, and had been disciplined in connection with two prior violations of the work rule. When the employee advertised his competing product in a local newspaper and attempted to make sales, management discharged him for violating the rule and a grievance resulted. The case proceeded to arbitration, where the arbitrator pointed out that employees in the bargaining unit refused to accept the policy prohibiting employees from competing with the company. The arbitrator further noted that management had sought, unsuccessfully, to have its policy included in the parties' collective bargaining agreement. Prior discipline pursuant to the policy against conflict of interest in employment had been imposed only on employees not covered by the contract. Arbitrator Koven concluded that "though a conflict of interest prohibition is normally one of management's rights, in light of their history, the parties have recognized that subject to be a negotiable matter insofar as its precise application is concerned."¹⁹

If Arbitrator Koven meant to imply that an employer may not exercise its inherent policy-making power if it had failed in an attempt to include a "conflict of interest" provision in the collective bargaining agreement, he espoused an unorthodox approach with which other arbitrators have not agreed. Also, he failed to develop any underpinning for this position in the decision. If such policies were made inoperative whenever the union refused to recognize them, the concept of inherent management rights would be completely without vitality. Arbitrator Koven did not urge his proposition too strenuously. This is reflected in the fact that he failed to rely on it for his conclusion that there was no just cause for the discharge. Instead he relied on other criteria, including the fact that the grievant never actually operated in direct competition with the company.²⁰

Although Arbitrator Koven's position seems precarious in several respects, some analytical artillery may be brought to its sup-

¹⁷ *Id.*

¹⁸ 57 Lab. Arb. & Disp. Settl. 68 (1971) (Koven, Arb.).

¹⁹ *Id.* at 71.

²⁰ *Id.* at 72.

port. It may be argued that constraints and rights respecting secondary employment are terms and conditions relating to the primary employment. Consequently, if there has been bargaining concerning such terms of the primary employment and the employer failed to have its position explicitly incorporated into the collective bargaining agreement, it may be argued that the issue has been left as an ambiguous grey area between the parties. In such a context, the appropriateness of full-bodied implementation of the employer's position on the matter is at least doubtful. If the employer has been unable to prevail at the bargaining table, then its right to prevail through arbitral fiat is certainly less than patent.

Although arbitrators generally recognize an employer's rule-making authority, most decisions reflect the requirement that work rules must be reasonable if they are to withstand challenge.²¹ A union has the right to test such rules through a contractual grievance procedure.²² At least one arbitrator, however, disagrees with this approach. In *Safeway Stores, Inc.*,²³ Arbitrator Caraway rejected an employee's challenge to a company rule which prohibited employees from having a financial interest in other business enterprises which required that some of their time or skill be expended away from the primary job. Safeway's rule stated:

Executives and employees shall not have a financial interest in other business enterprises which require a portion of their time or skill. This does not apply to ownership of listed securities or to modest agricultural operations such as farms or ranches which are owned primarily for diversion, recreation, or for reasons of health. It does apply to an individual business enterprise, business partnership, or stock ownership in closed corporations. The company will not employ, or retain in employment, persons who maintain interests in other business enterprises, or who have outside business activities which interfere with their duties to the Company. Execeptions [sic] to this policy may be made only at the discretion of the Division Manager.²⁴

²¹ See, e.g., *Youngstown Window Cleaning Co.*, 78-1 Lab. Arb. Awards 3596 (1978) (Chattman, Arb.); *National Broadcasting Corp.* (unpublished award, 1978) (Gentile, Arb.); *Western Paper Goods*, 77-2 Lab. Arb. Awards 4921 (1977) (High, Arb.); *William Feather Co.*, 77-1 Lab. Arb. Awards 3317 (1977) (Shanker, Arb.).

²² *Capital-Chrysler Plymouth, Inc.*, 70-1 Lab. Arb. Awards 3720 (1969) (Sembower, Arb.); see cases cited in note 13 *supra*.

²³ 67-2 Lab. Arb. Awards 5038 (1967) (Caraway, Arb.).

²⁴ *Id.* at 5038-39.

This rule goes considerably beyond protecting a company from an employee's outside interests which may economically harm it. Nevertheless, the arbitrator in *Safeway Stores, Inc.* refused to decide whether the work rule was overly broad. He concluded that the language of the work rule should be interpreted as written, and that the scope of the rule was a matter for negotiation.

A problem with such an approach is that it offers an aggrieved employee no possibility of successfully testing the company rule. Future negotiations about the scope of such a rule would be of no help in alleviating his immediate plight. Also, if promulgation of such rules is considered to be a management prerogative, then suggesting that refinements of an overly broad work rule be subject to negotiation is largely valueless since an employer is under no duty to bargain about them.²⁵ Therefore, if the approach used by Arbitrator Caraway were to prevail, the union would be powerless to challenge any company work rule, no matter how broad, restricting an employee's outside activities. Such a proposition seriously conflicts with the generally accepted principle that an employee has a right to govern his own activities unless his conduct directly prejudices the business of the employer.²⁶

Most arbitrators follow a more flexible approach. A work rule must protect a legitimate company interest to be considered reasonable. For example, a rule requiring employees to disclose to their employer any part-time work for competitors so that an employer can examine the potential for economic injury is reasonable.²⁷ Such a rule implies that an employer cannot deny the right of an employee to work elsewhere unless there is a significant showing of possible injury to the employer's business interest.²⁸ If a company has trade secrets to protect, a rule prohibiting employees from working for a competitor would be reasonable when there is a probability that such employment would result in the disclosure of such secrets.²⁹ Such a rule also would be reasonable in a highly competitive industry where a rival's ability to procure part-

²⁵ Since arbitrators have generally concluded that the establishment of such work rules is a management prerogative, see *Cummins Diesel Sales Corp.*, 34 Lab. Arb. & Disp. Settl. 637, 642 (1960) (Gorsuch, Arb.), the question of whether the subject matter is fundamental to the basic direction of the corporate enterprise already has been decided. Management is under no duty to bargain concerning such subjects. See *UAW, Local 864 v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972).

²⁶ *Mechanical Handling Sys., Inc.*, 26 Lab. Arb. & Disp. Settl. 402 (1956) (Keller, Arb.).

²⁷ *William Feather Co.*, 77-1 Lab. Arb. Awards 3317, 3320 (1977) (Shanker, Arb.).

²⁸ *Id.*; accord, *United Fuel Gas Co.*, 54 Lab. Arb. & Disp. Settl. 942 (1970) (Whyte, Arb.).

²⁹ *Western Paper Goods*, 77-2 Lab. Arb. Awards 4921, 4923 (1977) (High, Arb.).

time labor without paying fringe benefits would afford it a distinct advantage, especially in a bidding situation.³⁰

Employees are also frequently disciplined for moonlighting in alleged competition with the company where there are no explicit rules prohibiting it. Many such disciplinary actions withstand challenge. The rationale on which arbitrators rely to sustain an employer's rule-making authority—the need of a company to protect its economic interests—is also cited to justify disciplinary action against an employee in the absence of a rule against competition. However, the theoretical basis for upholding such discipline may vary.

The existence of an “implied rule” against competing with an employer has been used by one arbitrator to justify disciplinary action. In *Armen Berry Casing Co.*,³¹ the grievant was a truck driver for a sausage casing manufacturer. His duties included picking up rennets from various suppliers of the company for processing and sale to a pharmaceutical concern. Several times the grievant independently purchased some rennets from one of the company's regular suppliers, processed them on his own time, and sold them to the same pharmaceutical company with which the company dealt. Management discharged him for competing with the employer, and he filed a complaint which ultimately proceeded to arbitration. The arbitrator decided that the grievant's action warranted discipline, although he concluded that discharge was too severe. Arbitrator Russell Smith reasoned that although no work rule prohibited an employee from competing with the company, every employee has an implied duty to refrain from conduct which would seriously harm the employer's interests. According to Arbitrator Smith, standards which govern an employee's conduct outside working hours vary with the kind of job held and the nature of his employer's business:

Every employee is obligated to perform those tasks assigned to him on working time diligently and in the employer's interests. As a general proposition, the standards implied with respect to an employee's conduct outside of his working hours depends on such factors as the kind of business. What might be true of an executive or other supervisory employee might not be true of a rank and file employee. What might be true of a salesman, having special information of the employer's customers and

³⁰ Youngstown Window Cleaning Co., 78-1 Lab. Arb. Awards 3596, 3599 (1978) (Chattman, Arb.).

³¹ 17 Lab. Arb. & Disp. Settl. 179 (1950) (Smith, Arb.).

sources of supply, might not be true of an hourly-rated production worker. Moreover, the size, kind, and manner of operation of the business might be important. Undoubtedly, it is the implied duty of every employee, whatever the nature of the employment or size of the business, to refrain from private acts which will seriously harm the employer's interests.³²

The arbitrator reasoned that since the grievant did not have great responsibility, he was not under an implied duty to refrain, during his off-duty hours, from all transactions which were possibly competitive with the company. However, since there was some evidence indicating that the driver knew that the company wanted all the rennets it could obtain from the supplier, his independent employment usurped supplies earmarked for the employer, thereby damaging the company. Consequently, some disciplinary action was merited.

This decision suggests that disciplinary measures imposed upon an employee for working in competition with an employer should be related to the amount of damage done to that employer as a result of the employee's competitive conduct, thus intimating an appealing solution to the competitive work dilemma. Instead of an extreme position, which either upholds a discharge or orders reinstatement with back pay, this view would tailor the punishment to fit the offense. It discourages activity which is possibly harmful to the employer, while affording another opportunity for employment to those employees whose competitive activity caused no actual substantial injury to the company.

Other arbitrators agree that, in the absence of an explicit rule against moonlighting, an employer cannot discipline a worker for employment with a competitor unless the second job can economically harm the primary employer. In *Branch River Wool Combing Co.*,³³ the company discharged an employee who refused to give up his part-time job with a competitor. Management had known for several years that certain employees worked part time for various competitors. The arbitrator refused to imply the existence of a "no competition" work rule, and reinstated the employee. Even though the employee had worked for a competitor of his primary employer, the arbitrator noted that the grievant had not had access to trade secrets, and that the quality and quantity of his work at the primary job did not suffer. In other words, the grievant's second

³² *Id.* at 182.

³³ 31 Lab. Arb. & Disp. Settl. 547 (1958) (Pigors, Arb.).

job had in no way adversely affected the company. In a similar situation where there was no explicit rule against working for other such businesses, an arbitrator refused to uphold a part-time grocery clerk's discharge for seeking work with a competitor. The clerk's "duties and knowledge were such that he was simply not a potential source of damage to the company."³⁴

Nevertheless, when an employee operates an off-duty business in competition with the employer, arbitrators generally agree that discipline is appropriate. In *Moore Business Forms, Inc.*,³⁵ the grievant, a journeyman on a printing press, purchased, with a partner, a printing establishment which operated in direct competition with one part of the employer's business. After refusing either to sell his interest or to resign, he was discharged from his primary employment. In upholding the discharge, the arbitrator reasoned that the broad duty an employee owes his employer includes an obligation to refrain from engaging in an enterprise which is directly competitive with his employer.³⁶

Other arbitrators have reached similar results by relying on different theoretical bases. Some have concluded that such competitive conduct undermines the employment relationship. In *Firestone Retread Shop*,³⁷ an employee set up a business in direct competition with that of his primary employer and was discharged. In denying the employee's challenge to the dismissal, Arbitrator McCoy pointed out that the grievant's activity created a conflict of interest. Not only could the employee utilize improvements developed by the company, but his use of products or techniques which differed from those of his employer could be interpreted by potential customers as an indication that the company's products were inferior. However, the arbitrator did not view the grievant's discharge as disciplinary in nature: "I do not consider this discharge as disciplinary. His ownership of a competing business was not, strictly speaking, an offense. But it was a condition created by him, that made his continued employment by the Company intolerable."³⁸ The *Firestone Retread Shop* case leaves open the problem of whether harm created by the grievant's activity must be actual or merely presumed in order for a discharge to be upheld. If the competition is direct, it appears that the harm may be presumed.

³⁴ *Stop & Shop, Inc.*, 69-2 Lab. Arb. Awards 5727, 5729 (1969) (Johnson, Arb.).

³⁵ 57 Lab. Arb. & Disp. Settl. 1258 (1971) (Larson, Arb.).

³⁶ *Id.* at 1261.

³⁷ 38 Lab. Arb. & Disp. Settl. 600 (1962) (McCoy, Arb.).

³⁸ *Id.* at 601.

In cases involving direct competition, arbitrators rarely discuss evidence of declining sales or other indicators of economic damage. A threat of economic harm appears to be sufficient.

In cases involving trade secrets, arbitrators seem especially inclined to infer economic harm notwithstanding the absence of empirical data. In *Pipe Coupling Manufacturers, Inc.*,³⁹ an employee needed only to plan a business involving competition with the employer to merit disciplinary action.⁴⁰ Arbitrator Updegraff went further in another case and saw a basis for discipline when an employee's sons competed with the company:

The ordinary nature of family social relations, the proper instinct of a father to assist his sons, and the fact that the principal business interest of all three, the two sons and the father, is in gear manufacturing lead to the unavoidable assumption that they will from time to time discuss production methods and various shop routines with each other.⁴¹

Nevertheless, it seems that a legitimate question may be raised concerning the appropriateness of an irrebuttable presumption of economic harm, even where the competition represented by the secondary employment is direct. Without examination of the actual facts of a particular case, such a presumption might serve as a formalistic mechanism by which an employer might be rid of an employee who is objectionable on other grounds which are themselves insufficient to constitute good cause for dismissal. Consider, for example, a case where a primary employer is operating at full capacity, so that it is unable, at the present time, or in the foreseeable future, to service any additional business. If an employee, on his or her own time, performs services for customers whose orders the primary employer, perforce, must decline for the foreseeable future, what detriment has the employer suffered as a result of the employee's seemingly competitive activity? Given such circumstances, the employee's secondary work is not actually competitive with the primary employer, in the sense of depriving the latter of something from which it could profit. The employee, therefore, should not be subject to discipline for such work.

An argument almost as strong against disciplining the employee could be constructed in the situation where a primary employer, for example, earns millions of dollars annually by providing its

³⁹ 46 Lab. Arb. & Disp. Settl. 1009 (1966) (McCoy, Arb.).

⁴⁰ *Id.*

⁴¹ E.B. Sewall Mfg. Co., 3 Lab. Arb. & Disp. Settl. 113, 115 (1946) (Updegraff, Arb.); accord, Ravens-Metal Prods., Inc., 39 Lab. Arb. & Disp. Settl. 404 (1962) (Dworkin, Arb.).

product or service, while the employee, in his or her secondary work, earns merely several hundred or thousand dollars through plying the same trade. In such circumstances, realism seems to dictate that the impact of the employee's conduct is so *de minimis*, vis-à-vis the employer's total business, that discipline would be unwarranted and, arguably, retributive.

Whether or not there exists a work rule restricting an employee's competition with the company, it is reasonable to require a test of "substantiality" to justify discipline for such activity. Economic harm to an employer should not be presumed if there is no actual threat. The case of *Airport Ground Transportation*⁴² involved a company which transported passengers from the Houston, Texas airport to the downtown area. The employer discharged an employee for conflict of interest after the latter failed to relinquish his interest in a Yellow taxicab which he independently owned and drove, and which he sometimes used to transport airport passengers. The arbitrator decided that the discharge had been unjust because the company could not prove that it had actually suffered a loss from the grievant's activity. Since the employee merely drove one of the hundreds of cabs operating in the downtown area, there was no evidence that his activity had directly harmed the company.

In a similar case, management dismissed the assistant manager of a grocery store for failing to give up his interest in a nearby bar.⁴³ The employer had adopted a rule which prohibited employees from engaging in any business which could conflict with the company's best interest. Arbitrator Christopher found the discharge unjustified. Since the few items that both the bar and the grocery store sold in common constituted only a small part of the store's broad range of foods, he reasoned that the bar could not be considered a competitor.

In some conflict of interest situations disciplinary action is upheld by arbitrators, notwithstanding that the threat to the primary employer is not direct economic injury. In *George A. Hormel & Co.*,⁴⁴ an employee became production vice-president and director of a company directly competitive with his primary employer. Management discharged the employee after he refused to resign from Hormel. The employer suffered no actual economic damage

⁴² 72-1 Lab. Arb. Awards 3839 (1972) (Rohman, Arb.).

⁴³ *Albertson's Inc.*, 76-1 Lab. Arb. Awards 5034 (1975) (Christopher, Arb.).

⁴⁴ 71-2 Lab. Arb. Awards 5263 (1971) (Seitz, Arb.).

from the competitor, and the employee's secondary business apparently never even won a viable share of the market; nevertheless, there was some concern about a transmittal of trade secrets. In the grievance proceeding, Arbitrator Seitz concluded that even if there had been no such concern, the discharge would have been justified. He found just cause for the discharge in the company's legitimate concern about the public relations impact of an employee becoming vice-president of a prospective competitor.

This concern for public image also plays an important role in situations where an employee's second job is not economically competitive with the employer's enterprise. In *Niagara Falls Gazette Publishing Co.*,⁴⁵ a political reporter for a newspaper took a second job with a union publication known as the *Voice of Labor*. Although this job was only in a technical capacity, the reporter's name appeared on the union publication's masthead as editor. Because of this association with a paper whose political views were opposed to those of the primary employer, the newspaper charged that the employee's objectivity in covering political stories would be questioned by its readers. The reporter involuntarily resigned his *Voice of Labor* position and filed a grievance. Arbitrator Saul Wallen found that the grievant's position did create a conflict of interest. He stated, "it gave the appearance that, as a well-known name and figure to newspaper readers in the Lockport area, he was exploiting his connection with the publisher by permitting his name to appear as if he approved the editorial content of the *Voice of Labor*."⁴⁶ The conflict of interest was highlighted when a congressman complained to the publisher about a *Gazette* reporter being an editor of the *Voice* after the latter had published an article criticizing both the congressman and the *Gazette*. The arbitrator concluded that the grievant could retain his second job only if his name were removed from the *Voice's* masthead. Nevertheless, this case indicates that to find that a worker's second job creates a conflict of interest with his primary employment requires a showing of more than merely speculative problems.

In *Memphis Publishing Co.*,⁴⁷ management discharged two employees for owning and operating a bar and go-go club, claiming that this outside activity of the workers was against its best inter-

⁴⁵ 64-1 Lab. Arb. Awards 3557 (1963) (Wallen, Arb.); *accord*, Radio Buffalo, Inc., 44 Lab. Arb. & Disp. Settl. 428 (1965) (Seitz, Arb.); Tribune Publishing Co., 42 Lab. Arb. & Disp. Settl. 504 (1963) (Kagel, Arb.).

⁴⁶ 64-1 Lab. Arb. Awards at 3560.

⁴⁷ 67-1 Lab. Arb. Awards 3819 (1967) (Cantor, Arb.).

ests. The employees' primary responsibility on their first job included directing young news carriers, recruiting news personnel and checking on daily deliveries. The recruitment aspect of their job included securing parents' consent for their children to work for the company. The newspaper argued that the community disapproved of bars, and that the employees' activity made it harder to recruit newspaper carriers. The arbitrator rejected this contention. He found that operative statutes reflected the social mores of the community and that selling alcohol was a legal business. Furthermore, the arbitrator concluded that the fears of the company were based only on conjecture; there was no indication that the grievant's secondary business had in fact had any adverse effect on their job performance.

The arbitrator's assertion that the statutes reflect the mores of the community is open to criticism. Even assuming the statutes are not outdated, simply remaining on the books because of legislative inertia, it may well be that a substantial proportion of the community is personally averse to what is technically permitted from a strict legal perspective. Thus, even though selling liquor may be legal, if many people in the community are hostile to alcohol, then any business identified with liquor is likely to suffer. In such circumstances an employer's decision to discipline workers for being associated with alcohol-related activities could be considered justifiable.

Arbitrators agree that employers have a legitimate interest in protecting themselves against competition from their own employees. Rules prohibiting an employee from working in competition with his primary employer are regularly found to be reasonable. Only a showing that a grievant had knowledge of such a work rule⁴⁸ and that management did not apply the rule in a discriminatory fashion is required to uphold disciplinary action for a breach of the rule.⁴⁹ Evidence of actual economic harm caused by a breach of the work rule is unnecessary.⁵⁰ Even in cases where no rule exists, an employer may still discipline an employee who moonlights in competition with the company. In such situations, however, some showing of actual or potential economic damage, or injury to reputation is necessary if disciplinary action is to be sustained.

⁴⁸ Phillips Petroleum Co., 47 Lab. Arb. & Disp. Settl. 372, 374 (1966) (Caraway, Arb.).

⁴⁹ See, e.g., Traffic Transp. Eng'r, Inc., 70-1 Lab. Arb. Awards 4011 (1969) (Casselman, Arb.).

⁵⁰ See, e.g., Cummins Diesel Sales Corp., 34 Lab. Arb. & Disp. Settl. 636, 643 (1960) (Gorsuch, Arb.).

Thus, the "duty of loyalty" so often mentioned by arbitrators means that an employee shall not engage in activity that will harm the company economically or, in some situations, injure the company's reputation.

Working a Second Job While on Leave

In cases where a company disciplines an employee for working with a competitor, arbitrators focus largely on employer self-protection, potential economic damage to the company or potential injury to the company's reputation. However, arbitrators analyze cases differently where employees have been disciplined for working while on leave. Although a company also attempts to protect itself in this situation, the potential for damage to an employer is far less severe than when an employee works regularly for a competitor. Furthermore, the position of an employee in the former situation is often more sympathetic. That is, a worker may be trying to hold down a lighter second job, while on sick leave, in order to make ends meet until the employee is well enough to resume his primary full-time job. Consequently, in such situations, arbitrators often focus on circumstances surrounding an employee's procuring a second job rather than on how detrimental the second job is to the employer, which is generally the focus in cases where the employee is engaged in competitive employment. Nevertheless, the employer's interests always remain a relevant element.

A primary criterion utilized by arbitrators when evaluating sanctions imposed for working while on leave is whether the employee was physically able to satisfy the requirements of a second job, while unable to perform regular duties for his primary employer. For example, in *Danbury Cemetery Association*,⁵¹ a gravedigger was on sick leave because of an injury to his arm. He, however, remained able to continue his second job at a bar. The company discharged him for working while on sick leave, but an arbitrator ordered his reinstatement. The arbitrator reasoned that the employee's job at the bar did not indicate that he was malingering in not performing the laborious work at the cemetery. The discharge could not be upheld absent more definitive proof that the grievant could have performed his job at the cemetery on those days he

⁵¹ 42 Lab. Arb. & Disp. Settl. 446 (1964) (Stutz, Arb.); accord, *Aristocrat Travel Prods., Inc.*, 69-1 Lab. Arb. Awards 4042 (1968) (Koven, arb.).

called in sick.⁵²

Even where there is a valid company rule which prohibits working elsewhere while on sick leave, the result may be the same. In *Connor Lumber & Land Co.*,⁵³ an employee on sick leave awaited a doctor's release to return to work. During his wait, the employee accepted a lighter job with another company. Relying on its work rule prohibiting such conduct, the employer dismissed him. Although the work rule made clear that a breach would subject a violator to discharge, an arbitrator concluded that the company's action had been precipitate and that the grievant should be reinstated. The arbitrator pointed out that the employer had not had any light work available for the grievant and that it had not been injured by the incident.

Not all arbitrators are willing to look beyond the literal rule to fashion a rational result. In one case,⁵⁴ a grievant developed an eye problem that caused dizziness and double vision. His doctor declared him unfit to work. While on sick leave, the grievant was discovered plowing his fields in violation of a provision in his employment contract stating that "leaves will not be granted for the purpose of any other employment or business venture of an employee . . . , and any employee on leave who engages in such other employment or business shall not be entitled to return to his job and seniority."⁵⁵ Upon discharge the employee filed a grievance, but an arbitrator upheld management's disciplinary action. In analyzing the case, the arbitrator did not even consider the possibility that the eye impairment may have rendered the employee unfit to work at his primary job but not unfit to plow his field. Instead, the arbitrator concluded simply that a valid work rule existed and that the grievant had broken it.

Such an approach is hollow in that it fails to consider whether the purpose, rather than merely the wording, of the rule has been violated. The arbitrator viewed the rule's purpose as that of preventing abuse of sick leave, a valid concern of the company. If, however, the employee actually was unable to work at his regular job because of his disability, it is imprudent to bar him from work

⁵² 42 Lab. Arb. & Disp. Settl. at 447; *accord*, *Rock Hill Printing & Finishing Co.*, 64 Lab. Arb. & Disp. Settl. 856 (1975) (Whyte, Arb.); *American Bakeries Co.*, 43 Lab. Arb. & Disp. Settl. 1106 (1964) (Purdom, Arb.).

⁵³ 65-2 Lab. Arb. Awards 4902 (1965) (Larkin, Arb.).

⁵⁴ *Farmland Foods, Inc.*, 67 Lab. Arb. & Disp. Settl. 606 (1976) (Hutcheson, Arb.); *accord*, *United States Post Office*, 50 Lab. Arb. & Disp. Settl. 143 (1968) (Dash, Arb.); *Cities Serv. Refining Corp.*, 62-1 Lab. Arb. Awards 3998 (1962) (Sweeney, Arb.).

⁵⁵ 67 Lab. Arb. & Disp. Settl. at 607-08.

which he is capable of doing. To perform an outside job under such circumstances would not be an abuse of sick leave; the company would suffer no harm, and the employee might earn compensation which would be much needed if his sick leave benefits did not provide an adequate income.

Another factor considered by arbitrators in deciding the propriety of discipline imposed for moonlighting while on sick leave is whether the employee procured the second job during the leave or whether it already existed before the sick leave was taken. Where the job was procured during sick leave, arbitrators generally uphold discipline.⁵⁶ Where the employee already held the job, however, arbitrators usually find that discipline is unwarranted. One arbitrator explained that if "the company cannot forbid an employee to work at a second job during his off-duty hours, so long as it does not impair his job performance for the company, it cannot object to the continuation of such employment during a leave of absence."⁵⁷

Another arbitrator adopted such reasoning when management discharged an employee for working at a second job while on leave, in contravention of the collective bargaining agreement.⁵⁸ The arbitrator examined the purpose of such a prohibition and concluded that it was designed to prevent prolonged leaves and to stop employees from taking off work for unacceptable reasons. Thus, if there is no general rule against moonlighting and the second job does not actually interfere with the employer's interest, there is no reason to discipline an employee who continues a second job while on a legitimate leave of absence.

An argument against such an analysis might be fashioned as follows: the design of the rule, with administrative efficiency in mind, is to obviate any detailed inquiry about whether an employee, who works while on leave from his primary employment, is truly disabled from performing the latter. Failure to enforce such a rule stringently, once it is shown an employee had knowledge of it, could lead workers to take a chance and illegitimately extend leaves in order to continue work at a secondary job. Such an employee might act with the hope that if his second job is discovered, a proceeding will eventuate favorably to the employee. Thus, the precise situation the rule attempted to disarm would be

⁵⁶ See, e.g., *Armstrong Rubber Co.*, 57 Lab. Arb. & Disp. Settl. 1267 (1972) (Williams, Arb.).

⁵⁷ *Armstrong Rubber Co.*, 58 Lab. Arb. & Disp. Settl. 827, 829 (1972) (Williams, Arb.).

⁵⁸ *Mercoid Corp.*, 63 Lab. Arb. & Disp. Settl. 941 (1974) (Kossoff, Arb.).

countenanced.

Similar reasoning emerged from a case in which management granted an employee a leave to help his father build a leech bed.⁵⁹ However, the employer discharged the worker after he allegedly was found working in a logging camp. The basis for dismissal was violation of a contractual provision which called for loss of seniority should an employee accept other employment while on leave. An arbitrator ordered the employee reinstated. He construed the contract as not precluding an employee from accepting employment outside of work hours, since it did not prohibit such employment when not on a leave of absence. In other words, if there is no general provision against moonlighting, then the company has no claim to an employee's hours outside his normal shift, whether or not he has a leave of absence.

Analytically, it seems possible to rebut this last conclusion and to draw a distinction between moonlighting during off-duty hours while the employee is working at his primary job, and moonlighting during off-duty hours while on sick leave from the primary employment. Such a distinction could be based on public image considerations important to the primary employer. The employer may not want the public to get the impression that its employees are not paid sufficient benefits when they are sick or disabled to obviate a need to earn additional income elsewhere. It would make sense for an employer with this sort of public image concern to deny sick leave benefits to his employees who maintain secondary employment.

Sometimes employees are disciplined for simultaneously receiving disability benefits while on sick leave, and doing remunerative work. There is a conflict among arbitrators concerning the propriety of such discipline. In one such case, an arbitrator decided that discharging an employee for working at the same time he collected disability benefits did not constitute just cause for dismissal.⁶⁰ The arbitrator concluded that if the disputed outside work was not detrimental to the employee's speedy recovery, he was only engaging in self-help and should not be discharged. However, since the contract between the parties provided for a suspension of disability benefits if an employee performed remunerative work during the benefit period, the arbitrator ordered the employee to remit all money received from his employer for the period he was working at

⁵⁹ Houdaille Indus., Inc., 68-1 Lab. Arb. Awards 3691 (1968) (Jensen, Arb.).

⁶⁰ Corn Prods. Co., 65-1 Lab. Arb. Awards 3902 (1965) (Coffey, Arb.).

the secondary job and receiving disability payments from his primary employer.

In another case involving substantially the same facts, an arbitrator decided that an employer had just cause for discharging an employee who received disability benefits while working at a secondary job.⁶¹ The arbitrator offered no explanation for his conclusion other than to reject the union's claim that the employee had a right to the benefits. The result is curious in light of the fact that (1) a physician stated that the grievant could return to work only if it did not require heavy lifting, (2) the company did not have any light work available, and (3) the secondary job of working as a special policeman required no heavy work. Under such circumstances, the severity of the discipline administered is open to question. The contract between the parties did not provide that receiving disability payments while performing remunerative work was an offense. At most, the grievant was unjustly enriched, for which the remedy is repayment of the benefits. However, if the grievant already had the secondary job before his disability, a fact which is unclear from the case, he would not have been unjustly enriched and would be entitled to receive benefits which made up for the loss of his major source of income.

It should again be noted that it may be rational from a public image perspective for a company to deny an employee the opportunity to earn additional secondary income while the employee is not able to perform his primary job. A company may not want an employee to be seen seeking supplementary income when the employee is too disabled to report to his primary employment.

The underlying rationale of the cases involving moonlighting while on leave utilizes a premise similar to the one often used in cases involving competition with the employer. If the employer is protecting a legitimate interest, the discipline is warranted. For example, discipline is warranted when the secondary job will slow a worker's recovery or add to the chance of reinjury.⁶² Moreover, if the employee's reason for taking a leave is fallacious and the employee uses the time to engage in more lucrative employment, discipline is also warranted.⁶³ Still, arbitrators are generally disinclined to sustain discipline for employees who work on leave. If the

⁶¹ Robert Shaw Controls Co., 66-3 Lab. Arb. Awards 5685 (1966) (Justin, Arb.).

⁶² See Randle-Eastern Ambulance Serv., Inc., 65 Lab. Arb. & Disp. Settl. 394 (1975) (Sherman, Arb.) (sustaining grievance on grounds that there was not a sufficient risk of reinjury).

⁶³ See Bowaters S. Paper Corp., 38 Lab. Arb. & Disp. Settl. 965 (1962) (Hon, Arb.).

underlying purpose of a rule prohibiting such conduct is not served by the discipline, an employee's challenge of the discipline will generally be upheld.

Absences and Related Problems

Cases involving discipline for absences are often similar to those involving discipline for working while on leave of absence. For example, an employee may be absent from his primary employment due to an inability to work his regular job while he is still physically able to perform a secondary job. This problem is also confronted by arbitrators when sick leaves are involved.⁶⁴ However, other situations involving absences related to a second job must be resolved by an arbitrator as well. The simplest situation involves an employee who stays away from work without his employer's permission and works a second job. In this case the employer is clearly prejudiced by the employee's action, and disciplinary action by the employer will be upheld by an arbitrator.⁶⁵

The case is not so clear when an employee's second job indirectly affects the interest of a primary employer. In *Evinrude Motors*,⁶⁶ a company fired an employee after he lost two days from work because of an eye injury received at his secondary job. The employee was discharged pursuant to a rule which provided for disciplinary action if an employee's work suffered as a result of a secondary job. Management had specifically warned employees that workers who were absent because of an injury incurred while performing a second job would be discharged. The union disagreed with management's interpretation of the disciplinary rule. In finding the discharge too severe, an arbitrator stated that the company cannot unilaterally expand a rule in the face of union opposition. However, the arbitrator ruled that some disciplinary action was warranted because the employee violated a company rule, even though actual harm to the company was minimal. The penalty was reduced from discharge to a thirty-day layoff.

If there are no restrictions on moonlighting, it is illogical and unfair to sustain disciplinary action for the effects of any injury, whether it occurred at a second job or at the employee's home. An employer might well suffer some damage because of an employee's

⁶⁴ Amerace Corp., 68-1 Lab. Arb. Awards 3829 (1968) (Roberts, Arb.).

⁶⁵ Whippany Paperboard Co., 68-1 Lab. Arb. Awards 3827 (1968) (Buckwalter, Arb.).

⁶⁶ 66-2 Lab. Arb. Awards 5200 (1966) (McGury, Arb.).

injury, but if there is no wrongdoing or rule violation, disciplinary action should not be imposed.

To what degree employers have the right to control the lives of their employees is a question which arises when overtime work at an employee's primary employment conflicts with the hours of his secondary employment. If the employer can randomly schedule overtime hours it will effectively eliminate any opportunity the employee might otherwise have had to obtain a secondary job. On the other hand, if employers lose the ability to assign overtime work in accordance with specific needs, the right to successfully manage is jeopardized. Arbitrators generally agree that interests of the employer in such circumstances outweigh those of the employee.

In *Budd Co.*,⁶⁷ management scheduled an employee to perform inventory work on a Saturday. The employee asked that he not be required to work on that day because he had obligations at that time to another employer. Management warned him that the secondary job was an insufficient reason to release him from his obligation and that if he did not work on Saturday he would be discharged. The employee did not report to work on that day and management dismissed him. He responded with a grievance which proceeded to arbitration. Arbitrator Keefe explained that a full-time employer has a right to schedule overtime work in order to accomplish its legitimate business. This does not mean that an employer can schedule overtime whenever it pleases, however. The arbitrator reasoned that when the need to randomly schedule overtime arises due to production or scheduling exigencies inherent in the operation itself, it is permissible. In this case, for example, overtime work was an inherent part of the company's operation. Employees were made aware of this circumstance when they were hired. Although the arbitrator emphatically supported the employer's right to schedule overtime and to expect compliance from its employees, he nevertheless concluded that discharge was too severe a penalty. The arbitrator reached this decision because the company had a prior policy of trying to accommodate employees' scheduling problems whenever possible and this policy was not followed in the grievant's case.⁶⁸

⁶⁷ 69-2 Lab. Arb. Awards 5453 (1969) (Keefe, Arb.).

⁶⁸ *Id.* at 5458; *accord*, United States Steel Corp., 63-2 Lab. Arb. Awards 4817 (1963) (McDermott, Arb.).

Prohibitions Against Moonlighting

Employers generally do not flatly prohibit moonlighting. None of the published cases in which a secondary job was the cause of discipline involved a blanket prohibition by the employer against a second job. Most arbitrators recognize the general principle that governing one's own life is a right of employees unless the disputed activity directly affects the business of the employer.⁶⁹ Therefore, it is doubtful that a prohibition against all moonlighting would be upheld as a reasonable rule. Furthermore, employers might not want to discourage moonlighters because they are often unusually industrious workers.⁷⁰

In certain industries where public interest is at stake, however, a broad prohibition against moonlighting might be upheld. For example, in nuclear installations where the potential for disaster requires the utmost attentiveness from employees, an employer would have a legitimate interest, indeed, an obligation, to insure that employees are well-rested when they begin a shift. In addition, persons who are employed to deal with various sorts of emergency situations might well be contractually required to continually be on call. However, even under these circumstances, there is no reason to assume that a flat prohibition would be found reasonable. In fact, working a second job might not adversely affect an employee's attentiveness, and disciplinary actions would be legitimate only if it could be shown that the second job does affect attentiveness. Similarly, an employee might be able to remain on call in case of an emergency, even if he were working a second job.

On the other hand, it can be strongly argued that employers in such sensitive industries where public interest is at stake are entitled to implement general rules prohibiting moonlighting which represent reasonable decisions of management. In most cases, energetic individuals would not be fatigued or otherwise have their performance at their primary employment impaired simply because they were working at two jobs simultaneously. However, if it were established that the performance of the majority of employees working at jobs in a sensitive industry were adversely affected

⁶⁹ *E.g.*, *Mechanical Handling Sys., Inc.*, 26 Lab. Arb. & Disp. Settl. 401 (1956) (Keller, Arb.).

⁷⁰ *Akron Moonlighters: A Special Breed*, BUS. WEEK, Dec. 5, 1964, at 68. This opinion was also voiced by some individuals in management positions with whom we corresponded about the subject of moonlighting. *E.g.*, Letter from Pierce R. Brooks, Fire Department Chief, Seattle, Washington (July 20, 1979).

by their holding a second job, then a general prohibition by the employer against any secondary employment should be enforceable regardless of the employee's personal attributes or performance level. Given that a prohibition of moonlighting is indubitably reasonable in this sort of sensitive industry, an employer should not be put to the inconvenience and expense of litigating the impact of moonlighting in a particular case if the employee was made fully aware of the ban on outside employment when he accepted the job. As the sensitivity of the work or industry increases, so should the mechanisms available to the employer to guarantee that employee performance will not deteriorate due to fatigue or secondary job distractions.

Some employees work two full-time jobs, a situation which often results in discipline from one of the employers. Discipline may occur with or without a company policy prohibiting such dual employment. In *Goodyear Tire & Rubber Co.*,⁷¹ a full-time employee obtained a second full-time job in contravention of management's policy. When the company discovered this, a meeting was held at which management asked the employee to choose between the two jobs. He chose to remain with Goodyear, but filed a grievance challenging the company's policy prohibiting two full-time jobs. In denying the grievance, the arbitrator relied in part on past decisions which recognized the managerial prerogative of the company to impose such restrictions. The arbitrator acknowledged that an employee's off-duty hours are his own, but added that an employer may take action when its interests are adversely affected by an employee's outside activities. In this case, the evidence demonstrated that the grievant had an absentee problem before he obtained his second job. This information suggested that he was unlikely to do justice to both jobs. However, even when there is no evidence that an employee's work is suffering, disciplinary action has been upheld when an employee holds two full-time jobs in the face of a company prohibition.⁷²

When there is no plant rule against holding two full-time jobs, an employer cannot discipline an employee for working two such jobs without showing a causal relationship between poor work performance and holding a secondary job. In *United Engineering & Foundry Co.*,⁷³ such a dual employee was discharged after he

⁷¹ 1975 Lab. Arb. Awards 3557 (1975) (Dileone, Arb.); accord, *Professor with Two Jobs Recommended for Dismissal*, CHRONICLE OF HIGHER EDUC., July 16, 1979, at 2.

⁷² *Goodyear Tire & Rubber Co.*, 64-1 Lab. Arb. Awards 4264 (1963) (Lehoczky, Arb.).

⁷³ 37 Lab. Arb. & Disp. Settl. 1095 (1962) (Kates, Arb.).

caused products to spoil. The company attributed the spoilage to the employee's moonlighting. An arbitrator ultimately found for the grievant. Since spoilages were a common occurrence at the plant, the arbitrator concluded that the putative link between the second job and poor work performance could not be verified. Moreover, the company foreman testified that the grievant was a good worker and never appeared sleepy or tired. Since there was no plant rule prohibiting the grievant's conduct and no evidence indicating that the second job adversely affected his work, the arbitrator ordered him to be reinstated.

MOONLIGHTING IN THE PUBLIC SECTOR

Compared to the private sector, there is a dearth of arbitration awards involving employees in the public sector. This is hardly surprising in light of the fact that public sector unionism did not become prevalent until the 1960's.⁷⁴ Additionally, public sector employees have long been protected from arbitrary action of employers through civil service systems. Accordingly, it is likely that there will be proportionally fewer disciplinary proceedings in the public sector. As one might expect, only a handful of these proceedings have dealt with moonlighters.

Nevertheless, despite the absence of numerous awards involving public sector employees disciplined for holding secondary jobs, a comparison between the public and private sectors is illuminating in connection with determining whether the same criteria are, or should be, used in both areas.

An obvious difference between the two sectors regarding moonlighting is that, in government employment, the problem of competition with the employer, an issue which is so prevalent in the private sector, is non-existent. However, because many governmental positions involve public trust and confidential information, conflict of interest situations are more likely to arise. For example, questions might be raised if an employee for an environmental regulatory agency also works in a white collar position for a manufacturing concern with pollution problems.

Understandably, such conflict of interest situations are a keen concern to government employers. For example, all the collective bargaining agreements to which the city of Eugene, Oregon is

⁷⁴ The American Arbitration Association did not begin publishing *Labor Arbitration in Government* until January, 1971.

party, contain a provision stating that outside employment must be approved by the city. To receive approval, such employment must be compatible with an employee's duties and must in no way discredit employment with the city.⁷⁵ Sometimes civil service regulations, as a means of seeking to avoid conflict of interest situations, require a worker's employer to approve before a government employee is permitted to take a secondary job.⁷⁶

A threshold problem in this area is determining what constitutes a conflict of interest warranting forfeiture of a government employee's secondary job. It is possible for example, to construe some degree of conflict of interest respecting almost any outside job held by a police officer because such an employee may be less likely to enforce the law against his secondary employer. Indeed, prohibitions against police officers holding second jobs were quite restrictive at one time.⁷⁷ Such categorical injunctions, however, are both impractical and unfair to those affected. Instead, a government employee should only be proscribed from holding such secondary jobs if they directly conflict with the employee's ability fully to perform his public duties. For example, a public health inspector obviously should not own a business which he himself is required to inspect. Conflicts considered as disqualifying a worker from secondary employment should be actual and not abstractly hypothetical, as in the above-mentioned police officer situation.

With the exception of the cases involving conflict of interest, there seems to be no reason to utilize different standards as to discipline for moonlighting for employees in the public and the private sectors. For instance, in both sectors, an employee's secondary job need not interfere with the worker's obligation to the primary employer. In one public sector arbitration case,⁷⁸ for example, a

⁷⁵ The full provision of the collective bargaining agreement between the City of Eugene and the local chapter of the American Federation of State, County and Municipal Employees that deals with outside employment reads as follows:

Permission to work outside employment while a full-time employee of the City of Eugene must be approved by the department head. In order to be approved, the outside employment must: (a) be compatible with the employee's City duties; (b) in no way detract from the efficiency of the employee in City duties; (c) in no way be a discredit to City employment. The City may, upon reasonable grounds, revoke permission to hold outside employment at any time.

⁷⁶ Board of Chosen Freeholders, [1976] LAB. ARB. GOV'T ¶ 1576 (1976) (Silver, Arb.).

⁷⁷ Correspondence from Gary Bullard, attorney at law (June 21, 1979); Pierce R. Brooks, City of Eugene, Oregon police chief (July 25, 1979); Roy E. Hollady, City of Salem, Oregon police chief (July 27, 1979).

⁷⁸ Metropolitan Police Dep't (Washington, D.C.), [1978] LAB. ARB. GOV'T ¶ 2013 (1977) (Ordman, Arb.); *accord*, White Cloud Bd. of Educ., 74-1 Lab. Arb. Awards 8053 (1974)

police officer filed a grievance after the employer denied his application to work in a secondary job as a cabdriver. Management denied the application because the employee had a back injury which occasionally affected his ability to work. The arbitrator took the same approach which would be followed by an arbitrator in a private sector case, and examined the potential impact of the second job on the primary employment. He concluded that the employer had a reasonable basis to believe that the second job would aggravate the grievant's condition and would have a negative effect on his ability to perform his primary job.

However, the same issue discussed previously, with relation to industries involved in particularly sensitive activities, might be raised in the context of public agencies such as police or fire departments, where personnel not fatigued from or distracted by supplementary employment seem essential. Since the kind of performance that a police officer or firefighter may be required to render might be highly arduous and demand the deepest physical resources of the individual, should police and fire departments be able to maximize the likelihood that such resources will be optimally available through a rule which categorically prohibits outside employment, at pain of job loss if violation is discovered?

Criticism of such a proposal might point out that prohibiting secondary employment does not necessarily assure that employees will be well-rested and maximally fit for their primary employment. May not a firefighter on off-duty leisure time drink so many gin and tonics that he is far less capable of competently responding to any emergency than if he had merely worked a few hours at another job, such as carpentry? Arguably, such work might even serve to relax him and render him even more fit than he might otherwise be to perform his primary duties. Since leisure time cannot be controlled, why should employees not be permitted to be additionally gainfully employed during leisure time, if such secondary employment will not impair their primary job performance? If an employee who often gets inebriated on his leisure time would not be penalized for doing so, except insofar as the habit resulted in a deficient primary job performance, why should an employee holding secondary employment be penalized absent any similar showing of actual primary employment inadequacy?

There seems no possible logical response to such a position except one based on the reasonable probabilities implicated in an ad-

ministrative regulation precluding outside employment. If there is convincing evidence that such a ban will promote the efficiency of a work force, such as a fire department, because on the whole such a rule probably will result in a better rested, more alert group of employees than if there were no such rule, then it would seem that a public safety agency is categorically entitled to enforce such a regulation, notwithstanding that implementation of the regulation in particular circumstances might result in injustice. This might be the case if it could be clearly demonstrated (1) that most personnel barred from working second jobs by such a rule will probably not become involved in other activities likely to dissipate their physical well-being or mental alertness and (2) that many such employees would indeed moonlight if permitted to do so and would be less fit and more fatigued as a result. If these assumptions proved to be true, the net effect of the rule would be to enhance the potential performance level of the work force, and a strong case for categorical administrative enforcement of the rule would be established.

In certain public sector jobs, stringent restrictions on outside employment may be necessary. Firefighters, for example, may be required to be on call for emergencies and consequently their ability to obtain outside employment is restricted. The criteria used to judge the propriety of discipline imposed for breach of a work rule requiring an employee to be on call should be no different in the public and private sectors. In both, the basic criterion should be whether or not outside employment interferes with the ability of a worker fully to perform duties owed to the primary employer. As is stated in a contract involving employees of the City of Eugene, outside employment must "in no way detract from the efficiency of the employee in City duties."⁷⁹

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board occasionally reviews a case in which an employee has been disciplined for moonlighting. The Board, however, unlike an arbitrator, does not seek to determine whether a collective bargaining agreement has been violated. Rather, the function of the Board is to determine whether an employer's action, under whatever auspices, constitutes an unfair labor practice within section 8(a) of the National Labor Relations Act. In all cases involving discipline for moonlighting reviewed by

⁷⁹ For the full text of this provision, see note 75 *supra*.

the Board, the issue before it was whether anti-union animus motivated an employer's action, a violation of section 8(a)(3) of the Act.⁸⁰ The existence or absence of just cause for disciplining the employee is considered only as evidence of whether the company sought to discourage union activity. If there was no just cause for imposing discipline, it is more likely that the employer's motivation was an anti-union animus. As the legitimacy of imposing discipline increases, the less likely it is that an employer violated section 8(a)(3).

As in arbitration cases, competition with an employer is the reason most often given for disciplining an employee for moonlighting. The criteria of the Board used to evaluate the employer's action are similar to those used by arbitrators. One factor always considered is whether there is a contractual provision or work rule which prohibits the activity in question. If there is, the discipline imposed is usually considered justified. For example, in *United Engines, Inc.*,⁸¹ a mechanic performed outside work that otherwise would have gone to the company. An unwritten company policy, of which the employee had knowledge, prohibited such conduct. An administrative law judge found that the employer was protecting a legitimate interest in prohibiting such activity, and the Board agreed. There was no discussion concerning the amount of damage this particular activity caused the employer. It was sufficient that the employee had violated a company rule which sought to protect the employer against competition from its own employees.⁸² As in arbitration cases, violation of a company policy which bars an employee from establishing a business competitive with the company warrants disciplinary measures.⁸³

The Board has also upheld disciplining an employee for working in competition with the employer even absent a work rule prohibiting such conduct. In *Krebs & King Toyota*,⁸⁴ an employee diverted a sale from the company to himself. Management suspended and then discharged him. There was substantial evidence indicating that the discharge was motivated by an anti-union animus. Despite such evidence, however, an administrative law judge found the suspension to be reasonable, and the Board agreed. A supporting reason emerged from the fact that the business in question was highly

⁸⁰ 29 U.S.C. § 158(a)(3) (1976).

⁸¹ 222 N.L.R.B. 50 (1976).

⁸² See *id.* at 53-54; *accord*, *Mike Persia Chevrolet Co.*, 107 N.L.R.B. 377 (1953).

⁸³ *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 N.L.R.B. 701 (1974).

⁸⁴ 197 N.L.R.B. 462 (1973).

competitive. Thus, any sale became a matter of significance. Consequently, the employee should have realized that diverting such a sale was bound to provoke strong company resentment. Similar reasoning appears in arbitration decisions in which disciplinary action is upheld in the absence of an anti-moonlighting rule. If an employee's outside activity is economically injurious to a company, some measure of discipline is warranted.⁸⁵

The National Labor Relations Board generally holds that whether or not a company has a rule prohibiting competition with an employer, if it acquiesces in an employee's outside work it cannot thereafter discipline an employee for that work, without a warning or indication that such activity will no longer be tolerated. In *Sample Hart Motor Co.*,⁸⁶ for example, an employee who was an active union member violated contractual provisions by performing on his own time a service provided by the company. The employee had informed the company about his moonlighting activity, and management had never instructed him to discontinue such work. Because of the company's acquiescence, an administrative law judge concluded that the employee had been discharged for union activity rather than for violating the contract.

In another case,⁸⁷ an employee who was a brother of his employer, had competed against the company for years in bidding for a certain type of contract. However, in a year when the employee voted for union representation, management discharged him after he had entered his competitive bid. The National Labor Relations Board found that since the employee had not even been asked to withdraw his bid, he had been discharged for his pro-union position, not for competing with the company.⁸⁸

The Board has also utilized reasoning similar to that engaged in by arbitrators in cases involving employees who have worked while on sick leave. In *McCormick Longmeadow Store Co.*,⁸⁹ a trial examiner found that an employee, active in union organizing, had been lawfully discharged for working a second job in the evening, after he told his primary employer that he could not work during the day because he had a shoulder injury. The Board disagreed, finding that, in firing the employee, the company had made no effort to ascertain circumstances of the employee's secondary work

⁸⁵ See text accompanying notes 23-38 *supra*.

⁸⁶ 146 N.L.R.B. 518 (1964).

⁸⁷ *Alaska Glass & Millwork, Inc.*, 167 N.L.R.B. 785 (1967).

⁸⁸ *Id.*; accord, *Hill Top Baking Co.*, 93 N.L.R.B. 694 (1951).

⁸⁹ 155 N.L.R.B. 577 (1965).

or to compare the arduousness of the nightwork with that performed for the company during the day. Because the company had fired the employee, without further investigation, immediately upon learning of his working while on sick leave, the Board concluded that the action had been motivated by the employer's anti-union bias.

In deciding whether an employer's disciplinary action regarding moonlighting is motivated by prejudice against unions, the Board also examines whether outside employment interferes with an employee's ability to fully perform a primary job. In *DeGeorge Transfer & Storage Co.*,⁹⁰ the employer discharged six part-time employees who also held jobs elsewhere and were active union members. The Board agreed with the trial examiner's finding that anti-union sentiment did not occasion the discharges. Instead, the Board deemed the discharges reasonable as a reflection of the company's sound business desire to replace these employees with ones who were not otherwise employed and therefore could be on call at any time of the day.

Therefore, in most moonlighting cases, the National Labor Relations Board examines factors similar to those scrutinized by arbitrators although its ultimate objective is different. To determine whether an employer has disciplined a worker for union activity, the Board must consider whether a company had a legitimate reason for imposing discipline. If an employee competes with the company, discipline generally is found to be warranted as long as the employee has been warned of the conflict of interest and is treated evenhandedly in this respect with other workers. The Board, however, will not countenance the discipline of an employee for working a second job while on sick leave, failing an investigation by the employer into whether the worker could have performed a secondary job even though physically unable to handle his primary work. Further, the Board will look at the business rationale for an employer's discipline of a worker for holding a second job. If such secondary employment interferes with that employee's principal work, as in *DeGeorge*, where flexible scheduling was necessary in the primary employment, then such discipline will be more likely to be considered legitimate rather than generated by discriminatory purposes.

⁹⁰ 143 N.L.R.B. 83 (1963).

CONCLUSION

Any attempt to formulate a set of decisional criteria which can be employed in cases where employees are disciplined for moonlighting faces many difficulties. Contractual provisions governing management-labor relations vary considerably, and there are numerous and diverse factual contexts in which discipline occurs. However, it does not seem necessary to conclude, as did one writer who analyzed a number of disloyalty cases, that "any attempt to fit disloyalty cases into a unified theoretical framework is destined to futility."⁹¹

A conceptual structure can be established for moonlighting cases as long as it is recognized that specific provisions of a collective bargaining agreement must always be considered in evaluating the propriety of any discipline imposed for moonlighting. Under this limitation, the following criteria are relevant in analyzing the propriety of moonlighting strictures:

1. If an outside job affects an employee's ability to perform duties owed to the primary employer, then discipline is warranted. Such may be the case if an employee is constantly late, frequently absent, or simply performing poorly because of fatigue owing to the second job. In such situations, the fact that moonlighting occasions the problem is largely irrelevant. An arbitrator should instead examine whether the charge is in fact true and whether procedures followed in imposing discipline were in accordance with relevant provisions of any germane collective bargaining agreement.

2. A rule which prohibits working for a competitor, or otherwise restricts an employee's outside pecuniary activity, should not be overly broad. Such a rule should be designed to protect only an employer's legitimate interests. If a reasonable rule is breached, then there need not be a showing of actual detriment to the employer in order to uphold disciplinary action.

3. If there is no rule which prohibits moonlighting, an employer must show actual damage or the threat of damage in order to discipline an employee for working with a competitor or for working in competition with the company. Access to trade secrets in a competitive industry, for example, would constitute a threat to a primary employer if an employee with such access worked for a competitor. To warrant discipline, however, an employee must occupy

⁹¹ Foster, *supra* note 10, at 167.

a position in the rival company that is threatening to the primary employer. If an employee with access to confidential technical information regarding printing a newspaper works as a truckdriver for a competing company, disciplinary action for the secondary employment is probably not warranted. Discipline imposed for damaging an employer's business should be related to harm suffered by the company. The harm does not necessarily have to be strictly economic; an employer should be entitled to protect itself against injury to reputation.

4. Discipline imposed on an employee for moonlighting while on sick leave should not be sustained if the employee was physically able to perform the work incident to the second job, but was unable to perform duties required by the primary employer.

5. If a leave of absence is granted to a worker under the condition that the employee not work elsewhere during that leave, the condition should be construed only to limit the right to work at jobs procured during the leave. Similarly, if the hours of a job procured during the leave are outside those regularly worked for a primary employer, discipline should not be imposed unless the reason for obtaining a leave is fraudulent. The reason for each of these results is the same: if an employer had no right to control outside activities of an employee who was regularly on the job, there is no reason to grant that power to the company when an employee is on leave.

6. Receiving disability benefits while working a second job should not be a cause for discipline unless a work rule or contractual provision prohibits such activity. If an employee is unjustly enriched, then the money received should be returned. However, if an employee already held a second job before he became disabled, then the worker is not unjustly enriched by receiving disability benefits from his first employer while continuing to work at a second job, so long as the employee is physically able to perform his second job while still unable to perform his first job.

7. Considerations governing employees in the private sector should also be applicable to those in the public sector. Special attention, however, should be given to conflict of interest situations that might arise from public sector employment. In order for the government to prohibit an employee from engaging in a second job or to impose discipline for such action, the second job must directly conflict with duties performed by that employee for the government. This is not to suggest that there must be evidence of dishonesty. Rather, the appearance of impropriety should suffice to

warrant restricting an employee's outside pecuniary activity because of the public trust inherent in public sector employment.

It is difficult, if not impossible, to foresee all situations in which an employee may be disciplined for ramifications of a second job. However, by keeping in mind basic principles supporting criteria previously set forth, *viz*, that an employer may protect itself against economic harm, injury to reputation, or an employee's dishonesty, employers can achieve consistency in dealing with such problems. Finally, to achieve a uniform approach regarding the numerous rules and contractual provisions governing dual employment, there should be a careful analysis of whether the underlying purpose of such a rule or provision is satisfied by any discipline imposed. By observing these guidelines, the privacy of an employee's life apart from the workplace can be guaranteed and the legitimate interest of the employer can be protected.